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No. 83-904

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO, PETITIONER

v.

KENNETH M. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CARTER G. PHILLIPS
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will discuss the following issue:

Whether the Double Jeopardy Clause prohibits a defendant from being tried on charges of murder and aggravated robbery after his guilty plea is accepted by the trial court, over the State's objection, to lesser included charges contained in the same indictment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important issue regarding the double jeopardy consequences of a defendant's guilty plea to fewer than all counts of an indictment. Guilty pleas play a prominent role in the federal criminal justice system, and although this is a state case, the Court's decision will govern federal criminal cases as well. The United States therefore has a substantial interest in the outcome of the case.

STATEMENT

On February 13, 1979, a grand jury in Lake County, Ohio charged respondent, Kenneth M. Johnson, in a four-count indictment with murder, involuntary manslaughter, aggravated robbery, and grand theft in violation of Ohio Rev. Code Ann.

§§ 2903.02(A), 2903.04(B), 2911.01(A)(1) and 2913.02(A)(1) (Page 1982 & Supp. 1983). All four charges stemmed from the fatal shooting and robbery of Thomas Hill in Mentor, Ohio on January 25, 1979 (Pet. App. A2).

Following his apprehension in Tennessee and his return to Ohio, respondent was arraigned before the Court of Common Pleas of Lake County, Ohio, on October 9, 1980. At his arraignment, respondent offered to plead guilty to the charges of involuntary manslaughter and theft and to plead not guilty to the two more serious charges. Pet. App. A2. The State objected to the proffered guilty pleas, arguing that it had a right to have a trial on all of the charges in the indictment (Pet. 3-4).

The trial court held a hearing on November 26, 1980, at which, over the renewed objections of the State, it accepted respondent's guilty pleas. The court thereafter sentenced respondent to consecutive terms of three to ten years' imprisonment on the involuntary manslaughter charge and two to five years' imprisonment on the theft charge. Pet. App. A2. Subsequently, respondent filed a motion to dismiss the remaining charges against him on the ground that his right not to be placed twice in jeopardy for the same offense, as applied to the states through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784 (1969), would be violated if he were tried on those counts.

On March 31, 1981, the trial court granted respondent's motion (Pet. App. A21-A24). The court found that involuntary manslaughter was a lesser included offense of murder and that grand theft was a lesser included offense of aggravated robbery. It then reasoned that should the case "proceed to trial on the remaining charges and the factual evidence presented

is such that this Court would be compelled to charge the jury on the lesser offenses of involuntary manslaughter and grand theft, at that point the defendant's constitutional rights would have been surely violated" (Pet. App. A23).

The State appealed, and the Court of Appeals of Lake County, Ohio, affirmed (Pet. App. A14-A18). Relying largely upon the opinion of the lower court, the court of appeals held that involuntary manslaughter and grand theft are lesser included offenses of murder and aggravated robbery, respectively, and therefore that trial on the greater offenses was barred by the pleas (*id.* at A18).

The Supreme Court of Ohio, with one judge dissenting, affirmed (Pet. App. A1-A12). The court agreed with the State that the case did not involve "successive prosecutions such as to warrant the application of the collateral estoppel principles set forth in *Ashe v. Swenson* (1970), 397 U.S. 436, and its progeny" (Pet. App. A4). The court found, however, that the double jeopardy principle prohibiting multiple punishments for the same offense supported the dismissal of the indictment.

The court reasoned that if respondent could not be punished separately for the various statutory offenses, then he could not be convicted on all of the charges "regardless of the timing of the trial court's acceptance of his pleas" (Pet. App. A4). Relying upon *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Brown* v. *Ohio*, 432 U.S. 161 (1977), and Ohio's multiple count statute,[1] the court concluded that for

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[1] That statute (Ohio Rev. Code Ann. § 2941.25(A) (Page 1982)) provides in pertinent part:

> Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import,

double jeopardy purposes the lesser offenses to which respondent had pleaded guilty were identical to the remaining charges. Since he had already been convicted of involuntary manslaughter and grand theft on his pleas, the court held that dismissal of the remaining counts was required by the Double Jeopardy Clause.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause affords a criminal defendant three principal protections: it bars a second prosecution after an acquittal; it bars a second prosecution after a conviction; and it bars multiple punishments for the same offense. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). On their face, none of these protections appears to apply to respondent's situation. Certainly, he has not been acquitted of anything. The acceptance of his guilty plea to the lesser offenses can in no way be regarded as a determination of his innocence of the greater offenses charged. *United States* v. *Scott*, 437 U.S. 82, 97 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Contrary to the reasoning of the court below, the presence of greater and lesser included offenses creates no inexorable multiple punishment problem. If respondent is convicted after trial on the greater charges, then under the Supreme Court of Ohio's view of the offenses, the punishments should be merged. That is no reason to forbid a trial on the remaining charges. See *Green* v. *United States*, 365 U.S. 301 (1961). Although it is true that double jeopardy bars prosecution for a greater offense following trial

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the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

and conviction for a lesser included offense, *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), that rule has no application here unless it can be said that what the State proposes by trying respondent on the greater charges is successive prosecutions. But that merely poses the question whether a trial on the greater offenses after a guilty plea to the lesser ones, as part of the resolution of charges contained in a single indictment, infringes a defendant's right not to be prosecuted after a conviction; it does not answer it.

A.

1. The protection against double jeopardy derives from the common law pleas of autrefois acquit and autrefois convict and principally serves the same function in criminal law as res judicata and collateral estoppel do in civil law—protecting the defendant's right and society's interest in finality once judgment has been reached in a dispute. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Here, if the State had indicted respondent on charges of involuntary manslaughter and grand theft and he had pleaded guilty and been sentenced on those charges, the matter would be properly regarded as closed, so that a subsequent attempt by the State to prosecute on the greater charges would be barred under *Brown* v. *Ohio*, *supra*.

What is missing in this case is the final resolution of the entire dispute between the parties. Res judicata and collateral estoppel bar relitigation only when the first litigation has been completed. Since this case is still at the pretrial stage, double jeopardy's protection of the criminal defendant should be no greater than res judicata's protection of a civil defendant. If this were a civil suit, respondent's proposal to settle half of the case clearly would not

end the litigation; trial would proceed on the remaining counts. In short, respondent may have been convicted, but not "autrefois," which means on *another* occasion.

2. The determination of when an individual defendant has been subjected by state court proceedings to a prior jeopardy sufficient to bar a further prosecution of the government's charges does not depend on the technical form of the state's process. See *Swisher* v. *Brady*, 438 U.S. 204 (1978). Thus, the fact that the arraignment judge allowed respondent to plead separately to lesser included offenses in a preliminary proceeding should not bar his trial on the remaining portion of the case unless to do so would significantly undermine an interest guarded by the double jeopardy protection.

Allowing the single trial proposed by the State offends no double jeopardy policy. Respondent will not be subjected to any undue "embarrassment, expense or ordeal" by having pled guilty at an arraignment and then nevertheless having to face a single trial later. *Green* v. *United States*, 355 U.S. 184 (1957). Nor does the policy of "finality" based on the prior judgment entered on the pleas justify barring a trial. A pretrial disposition never creates more than a unilateral hope in the defendant that the case will end; it engenders no legitimate expectation protected by double jeopardy that the case will never proceed to trial. See *Serfass* v. *United States*, 420 U.S. 377 (1975).

The only "right" that is jeopardized by the Ohio proceedings is the State's right to a full and fair opportunity to prosecute respondent for the serious crimes with which he is charged. If this were a federal prosecution, we would urge the Court to va-

cate the plea as beyond the power of a federal court to accept over the government's objection and to remand for trial on the original indictment. Trial would be permissible just as in any other case in which the district court has erroneously dismissed charges prior to trial. *Serfass* v. *United States*, *supra*. Indeed, even a dismissal that occurred as the result of a midtrial plea to a lesser offense, made at the defendant's behest and over the prosecution's objection, would be reviewable, and retrial permissible, under *United States* v. *Scott*, 437 U.S. 82 (1978). We can see no reason under the Double Jeopardy Clause or logic why the result should be different simply because the guilty plea to the lesser included offenses remains in effect.

B.

If we are mistaken in our position that the proceeding should be viewed as a single occasion of jeopardy, respondent nevertheless is not immunized from trial, because he alone was responsible for this case being conducted in separate phases. "[A]lthough a defendant is normally entitled to have charges on a greater and lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (footnote omitted). Here, the State has done everything it could to have this entire transaction disposed of in a single proceeding; it was respondent who voluntarily chose to have the case handled in two stages. The Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice," *United States* v. *Scott*, 437 U.S. at 99,

and therefore the State should be permitted to proceed to trial on the remaining counts of the indictment.

ARGUMENT

As this Court has repeatedly stated, the Double Jeopardy Clause affords a criminal defendant three principal protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). See also *Illinois* v. *Vitale*, 447 U.S. 410 (1980); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977); *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). In order properly to resolve the issue posed in this case, it is necessary first to determine which of the double jeopardy protections is implicated by acceptance of a guilty plea to some charges, followed by a trial on other, greater offenses charged in the same indictment.

The first protection obviously has no application here; there has been no acquittal, actual or implied. The only actual judgment was a conviction based on respondent's guilty plea, and, as the federal courts of appeals have consistently held, the acceptance of a plea to a lesser included offense cannot be deemed an implied acquittal of the greater offense within the meaning of cases such as *Price* v. *Georgia*, 398 U.S. 323, 329 (1970), and *Green* v. *United States*, 355 U.S. 184, 191 (1957). See *United States* v. *Cruz*, 709 F.2d 111, 114 (1st Cir. 1983) ("[a]cceptance of a guilty plea to a lesser offense carries no implied acquittal of the greater offense and for this reason

is not the same as a verdict"); *United States* v. *Vaughan*, 715 F.2d 1373, 1375 (9th Cir. 1983); *United States* v. *Barker*, 681 F.2d 589, 591-592 (9th Cir. 1982); *Klobuchir* v. *Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk* v. *Berkemer*, 610 F.2d 445, 447 (6th Cir. 1979); *United States* v. *Johnson*, 537 F.2d 1170, 1174 (4th Cir. 1976); *United States* v. *Williams*, 534 F.2d 119, 121-122 (8th Cir.), cert. denied, 429 U.S. 894 (1976). While a trial court must inquire into the factual basis for a defendant's proffered guilty plea, that inquiry focuses exclusively on the elements of the crime that is the subject of the plea and sheds no light on the defendant's guilt or innocence of any other charges containing additional or different elements. Thus, the lower court decisions constitute a straightforward application of this Court's holding in *United States* v. *Scott*, 437 U.S. 82, 97 (1978) (brackets in original) (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)), that "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " It is thus clear that respondent has no double jeopardy claim based on his right not to be tried again after an acquittal.

The Supreme Court of Ohio concluded that *Pearce*'s third prong, the protection against multiple punishments, was the relevant concern in this case (Pet. App. A4). This conclusion is, we submit, manifestly incorrect. Respondent has received no multiple punishments for a single offense. He has not been, and indeed he may never be, convicted of the greater offenses charged in his indictment. In the event he is convicted on the murder and aggravated robbery

charges, it would appear from the opinion below that the penalty for the lesser offenses would merge and thereby bar the State from imposing consecutive sentences.[2] But this is certainly no basis for holding that the State cannot try respondent on multiple charges in the same indictment. See *Green* v. *United States*, 365 U.S. 301, 306 (1961) (entry of lesser punishment before entry of greater in same case does not limit defendant's sentence to the lesser).[3] "Where

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[2] The construction of state statutes regarding lesser included offenses is a matter generally left to the state courts. See, *e.g.*, *Illinois* v. *Vitale*, 447 U.S. at 416-417; *Brown* v. *Ohio*, 432 U.S. at 167. The Supreme Court of Ohio ruled in this case that the state offense of theft is a lesser included offense of the crime of aggravated robbery (Pet. App. A7). It is not altogether clear from the court's opinion, however, what the precise relationship is between the State's statutes prohibiting murder and involuntary manslaughter. The federal crime of involuntary manslaughter (18 U.S.C. 1112) is a lesser included offense of murder (18 U.S.C. 1111). See *United States* v. *Lincoln*, 630 F.2d 1313, 1320 (8th Cir. 1980); *United States* v. *Hendrix*, 542 F.2d 879, 883 (2d Cir. 1976), cert. denied, 430 U.S. 959 (1977). The court below stated without explanation, however, that involuntary manslaughter in Ohio requires a mental state inconsistent with that required to prove murder (Pet. App. A8-A9). Under that theory, involuntary manslaughter may not be a lesser included offense of murder, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), although a second prosecution after a conviction on one of the charges still would appear to be barred on collateral estoppel principles. See *Brown* v. *Ohio*, 432 U.S. at 166-167 n.6. In any event, we take no position on the State's contention (Pet. 14-15) that the two offenses do not bear the relationship of greater and lesser included.

[3] The Ohio multiple count statute, Ohio Rev. Code Ann. § 2941.25 (Page 1982), forbids two convictions for "allied offenses," but expressly allows the State to charge two such offenses. Thus, no problem should arise unless and until con-

consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U.S. at 165; see *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983), slip op. 9; *Gore* v. *United States*, 357 U.S. 386, 392-393 (1958). Thus, respondent's right to be free from multiple punishments is simply not ripe for consideration at this time. Should he be convicted of murder and/or aggravated robbery, his right against multiple punishments can be fully protected by review of the sentences he receives.

In analyzing the issue in terms of multiple punishments, perhaps the court below thought it was applying this Court's statement that "[i]f two offenses are the same under [the *Blockburger* test] for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Brown* v. *Ohio*, 432 U.S. at 166. See also *In re Nielsen*, 131 U.S. 176, 187-188 (1889). The problem with reliance on this principle in the present circumstances is that it is unresponsive to the question it is invoked to decide—whether a trial on the greater offense is a successive prosecution after a guilty plea to the lesser charge contained in the same indictment. Thus, the statement in *Brown* merely poses the problem; it does not answer it. It does, however, bring us to the only part of the Double Jeopardy Clause that can have any arguable relevance to this case, the prohibition against successive prosecutions.

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victions are obtained for both offenses; at that point, the conviction on the lesser allied offense could be vacated, if appropriate, thereby fully protecting respondent's rights under the statute.

A. The Double Jeopardy Prohibition Against Successive Prosecutions Would Not Be Violated In This Case, Because Trial On The Remaining Charges Will Complete A Single, Continuing Prosecution

1. At bottom, double jeopardy is principally a rule of finality; it constitutionalizes for criminal cases the civil law's principles of res judicata and collateral estoppel. See *Ashe* v. *Swenson*, 397 U.S. 436, 449 (1970).[4] Like res judicata in civil cases, double jeopardy saves the criminal defendant from continued distress caused by attempts to relitigate previously resolved charges and enables both the defendant and the state "to consider the matter closed and to plan ahead accordingly." Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 277 (1965). This guarantees that a prosecutor, dissatisfied with a criminal defendant's sentence, will not be able to retry the defendant in order to obtain a more "appropriate" sentence from a second judge (*id.* at 278).

These general policies of finality, derived from the common law pleas of autrefois acquit and autrefois convict, form the basis of the rule that the Double Jeopardy Clause prohibits a separate prosecution of a defendant for a greater offense after he has been convicted of a lesser included offense. *Brown* v. *Ohio*, *supra*. This Court has never considered whether that rule applies when a criminal defendant pleads guilty to the charges against him, rather than having stood trial, but there is no reason to doubt that it should.[5]

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[4] Because respondent relies on his *convictions* on lesser included offenses to bar trial on the greater, the collateral estoppel component of double jeopardy has no application to this case.

[5] An issue that may appear relevant to the proper disposition of this case, but which is in fact a red herring, is whether

A guilty plea to all charges in a criminal case, or to some charges with dismissal of others pursuant to a plea bargain, leads to a final judgment resolving the dispute between the litigants. Thereafter, under standard principles of res judicata, the defendant is entitled to consider the matter closed, and the prosecutor is properly barred from attempting to obtain another conviction on the same offense (including greater or lesser included variants) to the same extent as if the conviction had followed a trial. Thus, under *Brown* v. *Ohio*, *supra*, if respondent had been

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jeopardy attaches to a guilty plea. This Court has never faced the issue, although one lower federal court has stated that "[a]n impressive number of federal cases are nearly unanimous in holding that jeopardy attaches upon the court's acceptance of a guilty plea." *United States* v. *Cruz*, 709 F.2d at 112-113 & n.2 (citing cases). We have no quarrel with the holding in most of those cases that, except where the defendant has obtained vacation of the conviction based on the plea, a guilty plea to an offense should bar a subsequent prosecution for the same offense. Compare *United States* v. *Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980), with *United States* v. *Williams*, 534 F.2d 119, 121 (8th Cir.), cert. denied, 429 U.S. 894 (1976). One of the cases cited in *Cruz*, however, involved the situation presented here of a defendant pleading guilty to lesser included offenses and not guilty to greater offenses. See *United States* v. *Rocco*, 397 F. Supp. 655 (D. Mass. 1975). But the opinion in *Rocco* does not explain why, prior to trial and prior to any truly "final" judgment resolving the disputed issues, there is any basis for concluding that jeopardy attached to the greater charges in the indictment. Thus, the statement that jeopardy attaches to a guilty plea is almost certainly true for some purposes, but diverts attention in this case from what is important, which is that the estoppel effect of double jeopardy should be available to a defendant only when the entire dispute is either settled between the litigants or finally resolved after a trial on all of the disputed issues.

charged only with involuntary manslaughter and grand theft, and had pleaded guilty to those charges and been sentenced on them, respondent's interest in finality, protected by the Double Jeopardy Clause, would bar a subsequent effort to prosecute him for murder and aggravated robbery.

But the policy favoring "finality" cannot justify extending the rule of *Brown* v. *Ohio*, *supra*, against successive prosecutions to this case. Here, respondent offered through his proposed pleas to resolve only a portion of the entire case, and the State objected to disposing of *any* of the counts short of trial. Unlike in *Brown* or in the above hypothetical, there has been no resolution of all of the issues in dispute between the litigants in this case, and therefore no final judgment that could create a double jeopardy bar to proceeding with the unresolved portions of the case. See *G.&C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28 (1916).

In a civil suit arising out of a single transaction, if a plaintiff sought damages against the defendant in a complaint containing four counts and the defendant admitted liability on two counts with smaller potential liability, he could not thereby settle the litigation over the plaintiff's objection. Even if a separate judgment on the two counts were entered, it would not end the case, because the plaintiff would still be entitled to his day in court on the unresolved greater claims. There would simply be no final adjudication of the issues that could justify invoking res judicata to prevent the plaintiff from proceeding with the remainder of his case. Since, apart from the special treatment accorded acquittals, double jeopardy basically embodies the civil law's concepts of finality, there is no reason why the result should be any different

in a criminal case.[6] The defendant's double jeopardy interest in finality simply does not exist until the entire matter is settled to the mutual satisfaction of the parties or the case has actually been tried. Neither event occurred in this case, and therefore double jeopardy should not bar further proceedings on the issues that remain untried and unresolved.

2. Even assuming that traditional res judicata principles as to finality cannot be incorporated directly into double jeopardy analysis, we submit that under this Court's prior decisions the State's attempt to take this case to trial on the remaining charges would not impermissibly place respondent twice in jeopardy. We are willing to assume for purposes of this argument that jeopardy attached to respondent's guilty plea (but see note 5, *supra*), and therefore that the proposed further proceedings should be scrutinized to determine whether they create a risk of placing respondent twice in jeopardy. See *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973) (when jeopardy attaches "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars" a further trial); *Serfass* v. *United States*, 420 U.S. at 390 (same). Thus, the issue is whether the nature of the "two" proceedings to which respondent may be sub-

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[6] Double jeopardy also protects a defendant's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949); *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978). For this reason, the Court's double jeopardy doctrine has modified ordinary res judicata principles somewhat by deeming a case to be potentially "final" once a jury is sworn or evidence is taken in a bench trial. But no protected interest of the defendant is implicated by the arraignment process, and there is therefore no reason not to follow ordinary res judicata notions of finality in considering whether pretrial disposition of a part of the case bars further proceedings on the rest of it.

jected is such that a trial is merely a continuance of a single jeopardy or a prohibited attempt to place respondent twice in jeopardy. See *Swisher* v. *Brady*, 438 U.S. 204, 215 (1978).

The Court's decision in *Swisher*, upholding Maryland's juvenile court proceeding against a double jeopardy challenge, strongly indicates that, notwithstanding acceptance of the guilty pleas, Ohio's prosecution should be viewed as merely a single occasion of jeopardy. In *Swisher*, Maryland's juvenile court scheme provided for the use of masters in the initial phase of juvenile court proceedings. In a hearing before a master, the State would present its case by calling its witnesses and introducing documentary evidence, and the minor would present his defense. The master would then submit to the juvenile court judge his proposed findings of fact, conclusions of law, and recommendations. Both the State and the minor could file exceptions and elect review by the judge, either solely on the basis of the record made before the master or, if no one objected, on the basis of the record and supplemental evidence presented to the judge. The judge could accept, reject, or modify the master's proposed disposition, regardless of whether any party submitted exceptions.

This Court held that this type of two-stage proceeding was permissible, even though, unlike in this case, the first stage had resulted in what could arguably be characterized as an acquittal. Examining the purposes of the Double Jeopardy Clause's bar against successive prosecutions, the Court found that none was infringed. Because the State could present its evidence only once, in the hearing before the master, with supplemental evidence allowed only with the consent of the minor, the prosecution was not provided with "another opportunity to supply evidence which it failed to muster in the first proceeding."

Swisher, 438 U.S. at 215-216 (quoting *Burks* v. *United States*, 437 U.S. 1, 11 (1978)). Nor was the prosecutor allowed to enhance the risk of convicting an innocent defendant by taking the question of guilt to two separate factfinders. The juvenile court judge was empowered to accept, modify, or reject the master's proposals; the judge was thus the sole adjudicator (438 U.S. at 216). Finally, the Court found that the juvenile proceedings did not subject the defendant to the ordeal of a second trial, because whatever supplemental proceeding might be conducted by the judge was far more akin to post-trial legal arguments or briefing than to a full-blown second trial (*id.* at 216-217).

The "two-step" prosecution that respondent's guilty plea has caused in this case does no more violence to any of the purposes behind the Double Jeopardy Clause than Maryland's juvenile procedure. A trial on the remaining charges will not provide the prosecution with the forbidden "second crack" at supplying evidence it could not muster at a first trial, because there has been no trial at all and therefore no factual presentation by the State. Nor is the State attempting to take its case to a series of factfinders in order to enhance the possibility of a conviction. Respondent has admitted his guilt on two of the charges; the State is simply trying to resolve the remaining, contested charges by submitting them for the first time to a factfinder empowered to determine guilt or innocence. The State thereby seeks a fair opportunity to force respondent to "run the gauntlet" one time, and no more, for the serious crimes he is alleged to have committed. See *Green* v. *United States*, 355 U.S. at 190.

Indeed, allowing the single trial proposed by the State does not offend any double jeopardy policy recognized by this Court. The Court has repeatedly

stressed that the underlying purpose of barring *re*-trial is to protect the criminal defendant from the "embarrassment, expense and ordeal" of a second trial. *Green* v. *United States*, 355 U.S. at 187. See *United States* v. *DiFrancesco*, 449 U.S. 117, 128-129 (1980); *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *Serfass* v. *United States*, 420 U.S. at 387-388. Subjecting respondent to the single trial called for in the indictment handed down by the grand jury constitutes neither harassment nor repetitious litigation. *United States* v. *Goldman*, 352 F.2d 263, 266 (3d Cir. 1965). Nor did the hearings in connection with respondent's guilty plea impose any burdens or anxieties on him comparable to those associated with a trial, see *United States* v. *Cruz*, 709 F.2d at 114 ("the 'ordeal' of a Rule 11 proceeding is significantly different from the ordeal of trial"); and respondent did not suffer any risk of conviction at the guilty plea hearing on the charges to which he did not propose to plead guilty. In short, this case does not present an example of anything even remotely approaching the kind of governmental oppression that the Double Jeopardy Clause was intended to preclude. See *United States* v. *Scott*, 437 U.S. at 96, 99.[7]

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[7] As this Court summarized its holding in *Scott* (*Swisher* v. *Brady*, 438 U.S. at 218):

> In *Scott* we held that it is not all proceedings requiring the making of supplemental findings that are barred by the Double Jeopardy Clause, but only those that follow a previous trial ending in an acquittal; in a conviction either not reversed on appeal or reversed because of insufficient evidence, see *Burks* v. *United States*, *supra*; or in a mistrial ruling not prompted by "manifest necessity," see *Arizona* v. *Washington*, 434 U.S. 497 (1978).

In this case, there having been as yet no trial ending in either an acquittal, conviction, or mistrial, the continuation of the prosecution follows none of those occurrences.

Nor should the result be affected by the fact that a judgment was entered on the guilty pleas that was separate from the order dismissing the remaining counts. It is clear that the proper outcome of the double jeopardy issue should not turn on this "technicality." See *Serfass* v. *United States*, 420 U.S. at 391. Finality in pre-trial proceedings is simply not very meaningful. Respondent's stake in finality is, if anything, less than that of the defendant in *Serfass*, who received a final judgment on the merits dismissing the entire proceeding against him.[8] This Court nevertheless held that a trial was fully warranted if the dismissal was not justified. See also *United States* v. *Scott*, 437 U.S. at 96. Respondent's unilateral desire to end this proceeding without a trial is not a sufficient reason under the Double Jeopardy Clause to deprive the State of its opportunity to have its duly returned and as yet unresolved charges heard by a trier of fact.

Thus, no interest of respondent protected by double jeopardy policies is at stake here. On the other hand, if the prosecution is pretermitted at this point, one "right" will be violated—the public's vital right to "one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Indeed, if this were a federal prosecution, we would contend that the district court was

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[8] As we explained previously, finality does protect the defendant's right to consider the matter closed and begin to plan ahead. But where, as here, the defendant merely seeks to eliminate a portion of the case, he cannot reasonably anticipate that the matter is closed. If respondent anticipated the double jeopardy windfall that his plea might provide, he should not be allowed to use the timing of his motions to create the appearance of a final determination separate from the dismissal of the remaining charges. See *Jeffers* v. *United States*, *supra*.

utterly without power to accept respondent's guilty plea over the government's objection.[9] "[U]nder the Constitution, the government, as well as the defendant, has the right to insist upon a jury determination of those facts [alleged in the indictment]," and therefore "a plea to a lesser offense may not be tendered, and cannot be accepted by the court, unless the government consents." *United States* v. *Gray*, 448 F.2d 164, 168 (9th Cir. 1971), cert. denied, 405 U.S. 926 (1972) (granting a writ of mandamus reinstating the charges in the indictment). See *United States* v. *Olson*, 504 F.2d 1222, 1224-1225 (9th Cir. 1974) ("On the district attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute."). See also *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1976) (Burger, J.).

Thus, if a federal court had cut off the government's effort to prosecute a defendant in accordance with the grand jury's indictment, the resolution of the case we would propose would be simply to vacate the guilty plea and reinstate the full indictment.

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[9] We do not know whether the State of Ohio ordinarily allows its trial courts to accept guilty pleas to lesser included offenses without the prosecution's consent. The Supreme Court of Ohio did not address this question, although the dissent states (Pet. App. A11) that the pleas were "improperly" accepted. Obviously, if the State chose to, it could permit entry of guilty pleas to lesser offenses over the prosecution's objection and could also bar trials after the entry of such pleas as a matter of state law. But there is no reason why any such unique procedure for handling pleas to lesser included offenses should alter the appropriate disposition of this case under the Double Jeopardy Clause. See pages 21-22, *infra*.

Since jeopardy does not attach to a *vacated* plea entered prior to the swearing of the jury or the taking of evidence, see *Serfass* v. *United States*, 420 U.S. at 390-391, the "constitutional policies underpinning the Fifth Amendment's guarantee" are not implicated, and therefore there would be no bar to going forward with the full trial on all of the charges, including the lesser ones. *United States* v. *Jorn*, 400 U.S. 470, 480 (1970).

There is no apparent reason why the result should be any different for double jeopardy purposes simply because the State has no mechanism for vacating the guilty plea entered over its objection. Certainly, the defendant's interests are identical in both cases, as long as he cannot be subjected to multiple trials or punishments for the same offense. The only possible difficulty created by the existing guilty pleas, and it is really a due process and not a double jeopardy problem, is how the court should handle the lesser included offense issue if respondent goes to trial. See *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Keeble* v. *United States*, 412 U.S. 205 (1973). This was a concern to both the trial court and the court of appeals (Pet. App. A16, A23). But this problem can be eliminated by allowing respondent to withdraw his guilty pleas to the lesser offenses; alternatively, if the pleas are not withdrawn, respondent may nevertheless be permitted to elect whether the lesser included offenses should be submitted to the jury.[10] Either of these procedures will protect respondent from the risk

[10] No double jeopardy problem would arise from giving the lesser included offense instruction after respondent has pleaded guilty to those charges, since the decision to proceed in that way will have been respondent's. See *Jeffers* v. *United States*, 432 U.S. 137 (1977), and pages 23-27, *infra*.

of being convicted of the greater offense, even though the jury may have a reasonable doubt on the issue of intent, in order to avoid letting him go free if it believes he has committed some crime. See *Beck* v. *Alabama*, 447 U.S. at 634-635; *Keeble* v. *United States*, 412 U.S. at 212-213. Accordingly, the guilty plea presents no obstacle to conducting a fair trial on the remaining charges.

This Court has "disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. at 390 (quoting *Illinois* v. *Somerville*, 410 U.S. at 467). The holding that the entry of a guilty plea in the context of a single proceeding bars a trial furthers no policy of the Fifth Amendment and thus necessarily employs a "mere technicality" (420 U.S. at 391) as the sole basis for holding that respondent's rights have been violated. What this case involves is one episode, one indictment with four counts properly joined, a guilty plea to two counts, and a potential verdict on the others. There will be one trial, and noncumulative sentences. Respondent's trial should be viewed in its entirety as but a single occasion of jeopardy. *Green* v. *United States*, 355 U.S. at 187; *United States* v. *Combs*, 634 F.2d 1295, 1298, 1299 (10th Cir. 1980), cert. denied, 451 U.S. 913 (1981); cf. *People* v. *Tideman*, 57 Cal. 2d 574, 370 P.2d 1007, 21 Cal. Rptr. 207 (1962). Accordingly, the Double Jeopardy Clause does not bar the State from proceeding further with its prosecution.

B. Respondent's Double Jeopardy Right To Have Greater And Lesser Included Offenses Resolved In One Proceeding Has Not Been Violated, Because He Elected By His Guilty Pleas To Have The Charges Resolved In Two Stages

As we have previously acknowledged, the Double Jeopardy Clause ordinarily prohibits prosecution of a defendant for a greater offense after he has been convicted in a prior proceeding of a lesser included offense. *Brown* v. *Ohio*, *supra*. This rule is not, however, absolute.[11]

An important exception to this rule was recognized in *Jeffers* v. *United States*, *supra*, in which a plurality of the Court found no constitutional violation where the defendant was responsible for separate trials being held on greater and lesser included offenses. Thus, assuming contrary to our submission in the previous point that respondent's guilty pleas constitute "prior convictions" within the meaning of *Brown* v. *Ohio*, *supra*, double jeopardy still does not bar further proceedings in the present circumstances because respondent, and not the State, is responsible for the bifurcated nature of the proceedings. The facts of this case provide even stronger support than in *Jeffers* for a conclusion that no double jeopardy violation would result from separate resolution of the greater and lesser charges.

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[11] One recognized exception occurs when additional facts necessary to the greater crime either have not taken place at the time the prosecution for the lesser is begun, or have not been discovered despite the exercise of due diligence. *Jeffers* v. *United States*, 432 U.S. at 151-152; *Blackledge* v. *Perry*, 417 U.S. 21, 29 n.7 (1974); *Diaz* v. *United States*, 223 U.S. 442 (1912); *Ashe* v. *Swenson*, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring).

In *Jeffers*, a grand jury had returned two indictments against the defendant, one charging him and nine others with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and the other charging him alone with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. 848, by his supervisory role in the drug distribution ring. Jeffers and his co-defendants opposed the government's motion to consolidate the indictments for trial, and it was denied. Jeffers and his co-defendants were tried on the Section 846 conspiracy charge, and Jeffers was found guilty.

Jeffers then moved to dismiss the Section 848 indictment on the ground that the conspiracy conviction barred a subsequent trial on that charge, contending that the Section 846 conspiracy was a lesser included offense of the Section 848 continuing criminal enterprise. The district court denied this motion, and Jeffers was tried and convicted on the continuing criminal enterprise charge. This Court, assuming arguendo that Section 846 was indeed a lesser included offense of Section 848, nevertheless concluded that double jeopardy principles did not bar the second trial (432 U.S. at 152 (footnotes omitted)):

> [A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election.
>
> * * * [The defendant] was solely responsible for the successive prosecutions for the conspiracy offense and the continuing-criminal-enterprise offense. Under the circumstances, we hold that his

action deprived him of any right that he might have had against consecutive trials.

Here, just as in *Jeffers*, respondent was solely responsible for the need to resolve the charges against him in separate proceedings, and therefore his actions should preclude him from asserting any double jeopardy claim he might otherwise have had. But for respondent's decision to ask the trial court to accept his guilty pleas to the two less serious charges, he would have faced but one trial on the entire indictment, as the State urged in resisting his guilty pleas.

Indeed, two significant facts in this case make it even more appropriate than in *Jeffers* to reject the double jeopardy claim. Although the *Jeffers* plurality found that the prosecution was not responsible for the separate trial of the greater and lesser offenses, it had, as the dissent pointed out (432 U.S. at 159-160 (Stevens, J.)), chosen to return separate indictments and to try the lesser offense before the greater when its effort at consolidation failed. In the instant case, by contrast, the State was proceeding on a single indictment, so that from the outset of the prosecution there was never any reason to expect other than a single proceeding, nor was there any basis for the defendant to oppose a single trial. Furthermore, unlike Jeffers, who did undergo two trials (see *id.* at 159 n.5 (Stevens, J.)), respondent will undergo "successive prosecutions," if at all, only in the sense that the entry of his guilty pleas and later trial are somehow technically considered separate proceedings. At the completion of the contemplated proceedings against him, however, he will have undergone only one trial.

Nor can *Jeffers* be limited to the relatively unusual circumstance involved in that case, where the defendant expressly asked for two separate trials on the

two offenses and convinced the trial court to allow them. This Court has consistently held that whenever the defendant is the moving force before the trial court in creating the need for some additional proceedings, after jeopardy has attached, the government is not, absent oppressive conduct by the prosecutor, barred from completing its prosecution.[12] Thus, in *United States* v. *Scott*, *supra*, the Court held that a retrial would be permissible when the defendant had moved during trial to dismiss his prosecution for pre-indictment delay. The Court concluded "that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice" (437 U.S. at 99). It seems clear from *Scott* that if the plea and attendant dismissal had occurred in the middle of trial, appeal and retrial would be permissible without violating the Double Jeopardy Clause. The fact that both events preceded the start of any trial in this case could hardly afford respondent greater rights.

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[12] The only possibly "oppressive" action in this case—and it seems to us exceedingly farfetched to so characterize it—is the grand jury's decision to include separate counts in the indictment. This practice has been cited in double jeopardy cases to justify allowing the defendant to plead to the lesser offense and thereby bar further trial. See *United States* v. *Combs*, 634 F.2d at 1303 (McKay, J., dissenting); *United States* v. *Rocco*, 397 F. Supp. 655 (D. Mass. 1975). But both Ohio's rules, Ohio Rev. Code Ann. § 2941.25 (Page 1982) and Fed. R. Crim. P. 8(a) allow separate offenses to be listed in separate counts. We fail to see how the practice could prejudice a defendant in any way, and thus it makes no sense to rely upon the form of the indictment as the basis for deciding when a retrial is permissible. See *Jeffers* v. *United States*, 432 U.S. at 153 n.20.

Similarly, in *United States* v. *Dinitz*, 424 U.S. 600 (1976), the Court allowed retrial after defense counsel's conduct had caused the trial court to remove him, and the defendant agreed to a mistrial in order to obtain new counsel. The Court held that double jeopardy was not violated because "the defendant retain[ed] primary control over the course to be followed * * *" (424 U.S. at 609); cf. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982); *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). Respondent voluntarily chose to create two separate "proceedings" by pleading guilty to two counts instead of either pleading guilty to all counts or going to trial on all of them. If allowing the State one trial on the murder and robbery charges is deemed to subject him to a second jeopardy, it is a problem of respondent's own making. Particularly since it seems quite clear that the guilty pleas were a conscious stratagem to create a potential double jeopardy impediment to prosecution on the more serious charges leveled against respondent,[18] it offends fundamental concepts of justice to hold the State barred from trying respondent even once.

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[18] At the arraignment hearing, the judge told respondent's counsel that he wondered "what problems [respondent] is creating for himself by entering a plea at this time" (10/9/80 Arraignment Tr. 5). Respondent's counsel assured the judge "that [the plea] has been carefully thought out (*ibid.*) and informed the court that "if the State were to proceed on the prosecution of the other two counts as I am sure they would, the [respondent] would have certain matters to bring to the Court's attention" (*id.* at 5-6). The State's attorney understood the import of respondent's counsel's comment, and immediately objected to the acceptance of the pleas because they might create "double jeopardy problems if the State chooses to prosecute [respondent on the greater offenses]" (*id.* at 6).

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CARTER G. PHILLIPS
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

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